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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MASTER SERGEANT JOHNNY R. McCARTY,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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December 1996

31 pp

QUESTION PRESENTED

WHETHER THE MILITARY JUDGE VIOLATED DUE PROCESS BY PERMITTING THE PROSECUTION TO ELICIT THE CONFIDENTIAL SPOUSAL COMMUNICATIONS OF THE APPELLANT AND HIS WIFE THROUGH THE TESTIMONY OF JANET EVANS

The petitioner, Master Sergeant Johnny R. McCarty respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 30 September 1996.

INDEX

Page

QUESTION PRESENTED i
INDEX iv
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
ARGUMENT 1
CONCLUSION 14

TABLE OF AUTHORITIES

Page

United States Supreme Court:

Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951) 11

Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954) 11

Trammel v. United States, — U.S. —, 100 S.Ct. 906 (1980) 11

Wolfe v. United States, —U.S.—, 54 S.Ct. 279 (1934) 9

Federal Courts:

In Re Grand Jury Matter, 969 F.2d 995 (11th Cir. 1992) 2

United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991) 2

Hipes v. United States, 603 F.2d 786 (9th Cir. 1979) 11

United States v. Archer, 733 F.2d 354 (5th Cir.), *cert. denied,* 469 U.S. 196 (1984) 8, 9

United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) 2

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) 2

Military Courts:

United States v. Higgins, 6 U.S.C.M.A. 308, 20 C.M.R. 24 (1955) 11

United States v. Hughes, 28 M.J. 391 (C.M.A. 1989) 7, 8

United States v. Martel, 19 M.J. 917, 925–926 (A.C.M.R. 1985) 12

United States v. Nees, 18 U.S.C.M.A. 29 C.M.R. 29 (1968) 10

United States v. Smith, 33 M.J. 114 (C.M.A. 1991) 12

United States v. Tipton, 23 M.J. 338 (C.M.A. 1987) 12

United States v. Whitehead, 30 M.J. 1066 (A.C.M.R. 1990) 11, 12

State Courts:

Meador v. State, 711 P.2d 852 (Nev. 1985) 14

State v. Cohn, 576 P.2d 933 (Wash. Ct. App. 1978) 14

State v. Penn, 412 S.E.2d 660 (N.C. 1992) 14

Statute:

28 U.S.C. §1259

Rule of Evidence:

Mil.R.Evid.504 13

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at __ M.J. __ (1996), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 30 September 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1259 (3) (West Supp. 1995) and 10 U.S.C. Sec 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

5th Amendment

> No person shall . . . be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

On 20 November 1992, 26 and 28–30 January 1993, and 1 February 1993, appellant was tried by a general court–martial consisting of officer and enlisted members. Contrary to his pleas, he was convicted of sodomy, indecent acts, attempted carnal knowledge and giving alcohol to a child. He was sentenced to a bad conduct discharge, 10 years confinement, and reduction in rank.

ARGUMENT

THE MILITARY JUDGE VIOLATED DUE PROCESS BY PERMITTING THE PROSECUTION TO ELICIT.

THE CONFIDENTIAL SPOUSAL COMMUNICATIONS OF THE APPELLANT AND HIS WIFE THROUGH THE TESTIMONY OF JANET EVANS

Standard of Review

The federal courts are split on the proper standard of review to be applied by the appellate courts when considering privileges. The decisions in the various circuits have run the complete gamut. *See e.g., United States v. Mendelsohn,* 896 F.2d 1183, 1188 (9th Cir. 1990)("de novo"); *In Re Grand Jury Matter,* 969 F.2d 995, 997 (11th Cir. 1992)("plenary"); *United States v. Bilzerian,* 926 F.2d 1285, 1293 (2d Cir. 1991)("abuse of discretion"). *United States v. Wilson,* 798 F.2d 509, 512 (1st Cir. 1986)("clearly erroneous").

In deciding the correct standard to apply to military cases involving spousal privilege, the best place to start is Mil.R.Evid. 504. Nowhere in the rule is there language which suggests discretion on the part of the military judge. Either the privilege applies, or it doesn't. The standard utilized should be "de novo" or "plenary." This should be especially so in a case where, as in the one *sub judice*, the military judge makes no findings of fact regarding the motion. *Cf., United States v. Martel,* 19 M.J. 917, 924–926 (A.C.M.R. 1985).

Background

As previously noted, MSgt Johnny McCarty was convicted of attempted carnal knowledge, sodomy and indecent acts on Hollie, a child under 16 years of age. Hollie was first questioned by law enforcement authorities on 17 January 1992. She made no allegations of sexual abuse until 19 January 1992. The prosecution sought to introduce testimony from Hollie's natural mother, Janet Evans, that she

received a telephone call from the appellant's wife on 18 January 1992, the day before Hollie's revelations. Trial counsel proffered:

> The following morning, 18 January 1992, Mrs Janet Evans received a phone call from Sergeant McCarty's wife. Janet Evans will testify that Mrs McCarty called her and said, Janet, your daughter is making allegations that my husband sexually abused her. If you will tell her to drop these allegations, these charges, we'll work something out to get custody back to you.

R. 111. This alleged call was of significant importance in proving the prosecution's case.

> However, we do believe that it is relevant and very important to come to a jury, and that it is circumstantial evidence of the guilty mind of the accused. The investigators also will testify that Mrs McCarty was not present that night at the police station. Again, there was no mention of sexual abuse or sexual molestation to Sergeant McCarty that night by anyone, yet Janet Evans will testify that his wife knew about these allegations on Saturday morning. The evidence will further show that Hollie did not come forward and formally make any abuse allegation until 19 January.
>
> ***
>
> But after further looking at it hard, it was the government's position that it isn't hearsay, because, again I think the rule is the truth of the matter asserted in the statement, the statement being, your daughter has made allegations my husband has sexually molested her. We're not saying that

> statement is true because, in fact, Hollie hadn't made any allegations until the following day. We're just offering that it was said and the government believes that it is circumstantial evidence *that goes to the guilty conscience of the accused because there would have been no other way Mrs McCarty would have known unless her husband had told her because she was not present that night.*

R. 111–112, 113–114 (emphasis added).

Defense counsel objected to this evidence on the grounds of hearsay and privileged communications. R. 112–113, 114. The military judge ruled contrary to the defense, R. 115, and Janet Evans thereafter testified as follows:

> Yes. Margaret McCarty called me. She said that Hollie had stolen some rings, and she had found them in her drawer, asked Hollie about them, she didn't believe they weren't worth anything, so she took them and had them appraised. She found out they were worth a lot more money so she went to the lady that Hollie had babysat for, and the lady said, yes, those were her rings, and that she had pressed charges against her. She said that they had taken Hollie downtown and *that Hollie had accused Johnny McCarty of sexually molesting her,* and that if I would please, please, just tell her and convince her not to press charges, that I could have my daughter back.

R. 353–355 (emphasis added).

Following the testimony of Janet Evans, the military judge instructed the members as follows:

> Members of the court, the statements allegedly made by Mrs McCarty to Mrs Evans, in their phone conversation, would be hearsay if offered to prove

> the truth of the matter asserted. That is, that Hollie was alleging she had been sexually abused. A statement is not hearsay if it is not offered to proved the truth of the matter asserted.
>
> You may believe or not believe, as yo see fit, whether the statements were said by Mrs McCarty. However, in determining whether the accused is guilty of the offenses involving Hollie Smith, you may not consider them as evidence to prove the truth of the matter asserted, which is Hollie alleging that she was sexually abused.

The purpose of the testimony, as trial counsel stated, was to show consciousness of guilt on the part of the appellant. Trial counsel stressed this during arguments on findings where he stated:

> No one, all the investigators there that night, and the social worker came in here and told you, number one, she didn't admit abuse that night; and number two, no one mentioned anything to him about sexual molestation or sexual abuse. He was read his rights, as Sergeant Slease told you in his stipulation of expected testimony, he was read his rights for endangering the welfare of a minor by providing alcohol. That was it. No mention of sexual molestation or abuse.
>
> But he didn't know what Hollie had said back there. She had been back there for a long time, so now what's he got to do? He's a security policeman. Do I go home *and tell my wife that Hollie has made these allegations,* or do I wait, because the cops are going to be coming, because we submit to you, members, that in his mind he thought she'd spilled the beans, and that's why she was taken out of there by a

social worker. So now he's between a rock and a hard place. *Do I tell her? Do I come up front with her and say Hollie has made these allegations,* or do I wait for the police to come take me away, and tell her at that time?

* * *

And then what he did, members, *is he told his wife, you're going to hear, or Hollie saying*––members, the government submits to you that his wife, at that time became upset. She believed him, couldn't figure out what was going on with Hollie, so the next morning she called Mrs Evans, she called Janet Evans.

* * *

Members, that was the first person that Hollie Smith ever admitted to that she had been sexually abused. And that was Sunday, January 19th. So, how did Mrs McCarty know on Saturday morning, January 18th? It's simple, members, he panicked; *he panicked and figured he'd better tell his wife before the cops come and get him, having no idea that his wife would then call Janet Evans.*

* * *

And members of the court, again I ask you to keep in mind, because the government does submit that Margaret McCarty, the morning she called Janet Evans, told her about the allegations and if you believe Janet Evans, that that call was made, then you've got to ask yourselves, how would Margaret McCarty know when Hollie Smith had never told anyone, had told no one, no one mentioned a thing

> to that man about any sexual abuse, how would Margaret McCarty know? *The only logical conclusion you can come to, members of the court, is that he panicked. He panicked and he told his wife because he thought the cops were going to be coming, only he didn't know that Hollie was still keeping their little secret.*

R. 639–641, 643 (emphasis added).

While the prosecution's interest in presenting this testimony is understandable from the standpoint of advocacy, that interest does not convert inadmissible evidence into admissible evidence. The evidence which the prosecution alleged showed consciousness of guilt, appellant telling his wife that Hollie had made these allegations, was a confidential spousal communication and the military judge therefore abused his discretion in denying the defense objection.

Analysis

In analyzing this issue, it is important to distinguish between spousal incapacity and confidential communications. As the Court of Appeals for the Armed Forces in *United States v. Hughes,* 28 M.J. 391 (C.M.A. 1989), observed:

> Mil.R.Evid. 504 recognizes the "Husband–wife privilege." Section (a), "*Spousal incapacity,*" succinctly provides: "A person has a privilege to refuse to testify against his or her spouse." This language quite clearly makes two points––both of which are recognized in the Drafters' Analysis of the rule: First, the privilege belongs to the witness–spouse, not the accused–spouse; second, the privilege addresses the capacity of the testifying spouse to testify in court at all, rather *than the content of the testimony.*

> In both respects, this rule is distinguishable from section(b), "*Confidential communications made during marriage.*" Subsection (1) defines this privilege as follows: "A person has a privilege during and after the marital relationship to refuse to disclose, *and to prevent another from disclosing,* any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law." In contrast to the incapacity rule of section (a), this privilege is, at once, more expansive and more narrow: It belongs to either spouse, not just the testifying spouse: but it protects only confidential marital communications between the spouses, not in–court testimony about matters other than communications.

Id., at 393 (emphasis added).

The *Hughes* court went on to further distinguish the impact between these two sections of Mil.R.Evid. 504:

> In short, then, as the *Archer*[1] court concluded, once the Supreme Court ruled in *Trammel*[2] that the spousal–testimony privilege belongs only to the testifying spouse and that the defendant–spouse may not invoke it, the conclusion logically follows that neither can the defendant object to the spouse's out–of–court testimony. Moreover, again as the *Archer* court reasoned, the whole rationale underlying the witness–spouse's privilege in court is absent when the statement was made out of court: The out of court statement already has been made,

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[1]*United States v. Archer,* 733 F.2d 354 (5th Cir.), *cert. denied*, 469 U.S. 196 (1984).

[2]*Trammel v. United States,* 100 S.Ct. 906 (1980).

> so whatever harm to the marriage that might flow from such a statement already has occurred. While the marital–communications privilege is based on the policy of fostering marital confidences and focuses, therefore, on the timing of the communication (that is, it must be made within the marriage relationship), the spousal–testimony privilege focuses on the court–room and on the impact on the marriage from what happens there.

In *Wolfe v. United States,* 54 S.Ct. 279 (1934), this Honorable Court made the following observation concerning marital confidences:

> The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marital relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. [Citations omitted]. Hence, it is that the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of the one against the other, is not present. [Citations omitted].

Id., at 280.

The differing societal interests protected by the distinct provisions of Mil.R.Evid. 504 mandate contrary results when a spouse's out–of–court statement is introduced against an accused via a third party. As noted by the *Hughes* Court, this was discussed in *United States v. Archer*, 733 F.2d 354 (5th Cir. 1984), where it was observed:

> *Trammel* denies the defendant the right to exclude the testimony of his spouse offered against him at trial; so must it deny him the right to exclude the

> spouse's out–of–court statements when offered in evidence by a writing or through testimony of a third party. The witness–spouse enjoys the right to refuse to testify at trial, of course, but it would strain both the logic of *Trammel* and the basis of the privilege to allow the witness–spouse who refuses to testify under *Trammel* or who testifies for the defendant to demand the exclusion of previous statements made out of court.
>
> An out–of–court spousal statement is already made by the time of trial. Marital harmony would be enhanced minimally if at all, therefore, by excluding the statement when offered after the fact through a third–party witness at trial, and the "the normally predominant principle of utilizing all rational means for ascertaining truth" would be unnecessarily frustrated. [Citations omitted]. . .
>
> Finally, like the *Trammel* court, we distinguish communications from one spouse to another made in confidence. *Such statements are protected, regardless of the means by which they are offered into evidence,* by the separate privilege accorded confidential marital communications. [Citations omitted].

Id., at 358–359. This echoes the reasoning of the court in *United States v. Nees,* 18 U.S.C.M.A. 29, 39 C.M.R. 29 (1968):

> While the presence of a third person at the time the communication was made might be evidence that no confidentiality was intended [citations omitted], the same view does not obtain for documents coming into possession of a third person through voluntary delivery by the addressee–

> spouse––otherwise the privilege could by collusion be practically nullified for written communications. As Wigmore states, "The privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate; it thus belongs to the *communicating* one." [Citation omitted].

Id., at 32 (emphasis in original).[3]

Having established the general principle that an accused may prevent a third party from disclosing marital confidences, the next matter to address is whether the elicited testimony involved such a confidence. All "[m]arital communications are presumptively confidential, *Blau v. United States*, 340 U.S. 332, 333, 71 S.Ct. 301, 302, 95 L.Ed. 306 (1951);[4] *Hipes v. United States*, 603 F.2d 786 (9th Cir. 1979); and such presumption may only be overcome 'by proof of facts showing that they were not intended to be private.' *Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 361, 98 L.Ed. 435 (1954)." *United States v. Whitehead*, 30 M.J. 1066, 1072 (A.C.M.R. 1990).

The prosecution argued that the appellant "had *told*" Mrs McCarty about the sexual abuse allegations. R. 114 (emphasis added). Thus, it was clearly communicative. Further, there

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[3]An accused–spouse has an even greater expectation that verbal communications will remain confidential. Written communications have a certain degree of permanence compared to the spoken word. "Where a letter of one spouse falls into the hands of a third person, it is said that the 'sacred shield of privilege' is removed, since one who makes a communication to another in writing is deemed to have understood that it might be preserved and used against him." *United States v. Higgins*, 6 U.S.C.M.A. 308, 20 C.M.R. 24, 33 (1955), citing Wharton, Criminal Evidence, 11 ed., § 1256.

[4]In *Trammel v. United States,* 100 S.Ct. 906, 909–910, note 5 (1980), the Court observed that they were not disturbing the decisions in *Wolfe* and *Blau*.

was no contention that the appellant and Mrs McCarty were not married, or that the communication occurred outside the marital relationship. "So long as a married couple has not been 'separated as provided by law,' the confidential communication is privileged." *United States v. Tipton,* 23 M.J. 338, 344 (C.M.A. 1987).

The prosecution never argued, nor was any evidence presented to establish, that the appellant intended his spouse to disclose the confidence to a third person. Indeed, trial counsel argued to the contrary when he asserted the appellant had "no idea that his wife would then call Janet Evans." R. 641. *Cf., United States v. Whitehead,* 30 M.J. at 1072–1073 ("We agree with the military judge that appellant's communication to Mrs. Whitehead to 'tell them what time he came home' was not a confidential communication since it was intended to be conveyed by her to third persons, namely CID agents that might be calling"); *United States v. Martel,* 19 M.J. 917, 925–926 (A.C.M.R. 1985)("any private communication between spouses is presumed confidential and thus privileged; however, this presumption can be negated by proof that the communication, although uttered in private, was of such a nature or was made under such circumstances as obviously to have been intended to be subsequently conveyed to other persons").

Neither the appellant nor his wife testified on direct examination about conversations occurring after the appellant returned home on the evening of 17 January 1992. The appellant certainly did not "predicat[e] his defense" on any such conversation. *United States v. Smith*, 33 M.J. 114, 118 (C.M.A. 1991). On direct and cross examination Mrs McCarty merely responded in the negative when asked if she had told Janet Evans anything about sexual allegations on 18 January 1992. R. 498–499, 500. Under such circumstances there was no waiver of the privilege.

Even if waiver could be implied, the analogous situation considered by the *Martel* Court is applicable:

> We recognize that "waiver may be found in . . . some act of testimony *which in fairness* places the person in a position not to object consistently to further disclosure. 8 Wigmore, *Evidence* § 2340(2) (McNaughton rev.1961)(emphasis added). However, we conclude that admission of substantial portions of Gracie's testimony in this case was error, based upon our finding that it is fundamentally unfair to invoke a waiver of marital privilege when an appellant timely asserts the privilege at trial, is erroneously thwarted in this effort by the military judge, scrupulously avoids testifying as to the privileged communications on direct examination, and denies engaging in these acts and conversations in response to questions posed by the government and the court members. To hold otherwise would provide the government with an unfair advantage and a virtually unrestrained opportunity to circumvent the President's intent in promulgating M.R.E. 504(b). This we will not do. Moreover, the government's failure to raise the issue of appellant's waiver of the marital privilege at trial circumscribes our ability to review this issue on appeal absent plain error. *See United States v. Brown*, 634 F.2d at 829.

19 M.J. at 930.

One last aspect of Mil.R.Evid. 504 bears comment. Mil.R.Evid. 504(c)(2) states that there is no privilege "In proceedings in which one spouse is charged with a crime against . . . a child of either." While Hollie may have been in the custody of the McCarty's, she was not "a child of either." The President, in adopting the Military Rules of Evidence, has

not followed the path of several states in extending this exception to custodial settings. *See, e.g., Meador v. State,* 711 P.2d 852, 854 (Nev. 1985)("a child of either, or a child in the custody or control of either"); *State v. Penn,* 412 S.E.2d 660, 662 (N.C. 1992)("the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse"); *State v. Cohen*, 576 P.2d 933, 938 (Wash. Ct. App. 1978)("any child of whom said husband or wife is the parent or guardian"). Thus, the exception does not apply in appellant's case.

CONCLUSION

Appellant's trial was lengthy and the charges hotly contested. A conviction, particularly without the testimony concerning the telephone conversation between Mrs McCarty and Janet Evans, was far from certain. The military judge's ruling violated the process due as protected by the 5th Amendment to the United States Constitution. The conviction should be set aside.

Respectfully submitted,

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December 1996

APPENDIX A

UNITED STATES, Appellee

v.

Johnny R. McCARTY, Master Sergeant
U.S. Air Force, Appellant

No. 95–0851
Crim. App. No. 30556

United States Court of Appeals for the Armed Forces

Argued May 22, 1996

Decided Sep. 30, 1996

Counsel

For Appellant: *Colonel Jay L. Cohen* (argued); *Captain Richard R. Desmond* (on brief).

For Appellee: *Colonel Jeffery T. Infelise* (argued); *Captain R. Scott Howard.*

Military Judge: Howard R. Altschwager

Opinion of the Court

COX, Chief Judge:

Appellant was convicted of crimes arising out of sexual misconduct with his niece, a child under the age of 16.[1] We granted his petition to consider whether evidence introduced against him at trial was a confidential spousal communication, and was therefore inadmissible as a privileged communication under Mil.R.Evid. 504(b), Manual for Courts–Martial, United States (1995 ed.). We hold that it was not.

FACTS

The victim, appellant's niece, lived in appellant's home. She and a girlfriend were implicated in a theft of jewelry which had taken place in a residence on Malmstrom Air Force Base. At the request of the security police, appellant took his niece to the police station to be interviewed concerning the theft. En route, appellant asked his niece to lie about alcohol that he had furnished her and her girlfriend. The alcohol had been found in a closet in the girlfriend's room. He also asked her not to tell the police about his sexual activities with her.

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[1]Appellant was tried by a general court–martial at Malmstrom Air Force Base, Montana, consisting of officer and enlisted members. He was convicted, contrary to his pleas, of attempted carnal knowledge, sodomy with a child, and committing indecent acts, in violation of Articles 80, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 925, and 934, respectively. He was also convicted of violating Montana law by giving an alcoholic beverage to a minor, in violation of Article 134. Appellant received a bad–conduct discharge, confinement for 10 years, and reduction to Airman First Class. The convening authority approved the sentence. The Court of Criminal Appeals affirmed the findings and the sentence in an unpublished opinion.

Although the victim eventually told the security police the truth about the alcohol found in her girlfriend's closet, she did not tell the police about appellant's sexual activities with her.

Following the interview, the Montana Department of Family Services became involved in the case and made a decision to remove the victim from appellant's home. The victim did not reveal the sexual misconduct to the Montana authorities. The first time the victim told anyone about the sexual misconduct was on January 19, when she revealed it to her mother during a telephone conversation.

On January 18, and before the victim had told anyone about appellant's sexual behavior toward her, appellant's wife, Margaret, telephoned Janet Evans, the victim's mother. Ms. Evans testified about statements Mrs. McCarty made to her during that conversation, as follows:

Yes. Margaret McCarty called me. She said that [H][the victim] had stolen some rings, and she had found them in her drawer, asked [H] about them, she didn't believe they [were] worth anything, so she took them and had them appraised. She found out they were worth a lot more money so she went to the lady that [H] had baby sat for, and the lady said, yes, those were her rings, and that she had pressed charges against her. She said that they had taken [H] downtown and that [H] had accused Johnny McCarty of sexually molesting her, and that if I would please, please, just tell her and convince her not to press charges, that I could have my daughter back. Then she proceeded to tell me what a horrible, horrible child I had, how she didn't. . . .

At that point, defense counsel objected to the testimony as being beyond the ruling of the military judge. His objection was sustained. Following the witness' testimony, the military judge instructed the members that they could not consider the statements as evidence that H "was alleging she had been sexually abused." He continued:

> You may believe or not believe, as you see fit, whether the statements were said by Mrs. McCarty. However, in determining whether the accused is guilty of the offenses involving H., you may not consider them as evidence to prove the truth of the matter asserted, which is H. alleging that she was sexually abused.

In resolving the issue presented in this case, we must first look at how it was raised at trial. During an *in camera* session, Article 39(a), Uniform Code of Military Justice, 10 USC § 839, trial counsel advised the military judge that he intended to call Ms. Evans for the purpose of introducing the foregoing statement. Defense counsel initially contended that the evidence was hearsay. At the prompting of the military judge, defense counsel further stated that he believed the statement also involved the spousal privilege. Importantly, although there was some discussion between the military judge and defense counsel concerning whether the statement was covered by the spousal privilege, no specific objection was made on that basis, and no findings of fact were made by the military judge.[2]

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[2]Although we do not base our decision on waiver, this case shows exactly why Mil.R.Evid 103, Manual for Courts–Martial, United States (1995 ed.), requires a timely objection, stating the specific ground of objection, and requires a record that the appellate court can review. It is difficult, if not impossible, to second guess the intent of the trial defense counsel if he or she does not make the specific objection known to the military judge. Though not at issue here, a good argument can be made that the testimony of Ms. Evans concerning her conversation with Mrs. McCarty was "double hearsay" or perhaps even "triple hearsay, *i.e.* Mrs. McCarty said that appellant said that H said, etc. However, it appears from the record that all the parties understood that the evidence was being offered as a "circumstance" surrounding the first revelation of the allegations, and nothing else.

At trial, the prosecution used the statement to argue that it was evidence of appellant's guilt. Trial counsel stated:

> [I]f you believe Janet Evans, that that call was made, then you've got to ask yourselves, how would Margaret McCarty know when [H] [the victim] had never told anyone. . . . The only logical conclusion you can come to, members of the court, is that he panicked. He panicked and he told his wife because he thought the cops were going to be coming, only he didn't know that [H] was still keeping their little secret.

The Court of Criminal Appeals found:

> While the appellant is certainly correct that trial counsel treated the appellant's wife's comments, as reported by Janet, as circumstantial evidence to show the appellants guilty state of mind, we find no spousal "confidential communication" here to protect. Mil.R.Evid. 504(b)(1).

Unpub. op. at 4.

We agree with the court below. Mil.R.Evid 504(b)(1) provides:

> A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

There is nothing inherent in the testimony of Ms. Evans that reveals itself as a confidential marital communication. First, Ms. McCarty denied making any such statement to Ms. Evans. Second, it can be fairly argued that the military judge and defense counsel were focused on the idea that the

telephone conversation contained a hearsay declaration of the victim, not a spousal privileged communication. Assuming *arguendo* that the conversation could be so construed, the burden of establishing that there even was a marital communication is upon the party claiming it. *See* Mil.R.Evid. 504(b)(3), Manual, *supra*. There is in fact no direct or circumstantial evidence that appellant ever had a privileged conversation with his wife. Under these circumstances, we conclude that appellant failed to make out a claim of a privileged communication. Lastly, there was no objection to the testimony on the grounds of spousal privilege, only conversation about it. Therefore, the military judge did not abuse his discretion, so his ruling allowing admission of the testimony was not clearly erroneous. Mil.R.Evid. 103; *see United States v. Rust* 41 MJ 472, 479 (1995).

Once the military judge allowed the telephone conversation into evidence, the logical and legal inferences which could be drawn from that conversation, *i.e.* that appellant had guilty knowledge of the sex abuse prior to the time the allegations were actually made, were fair game. The military judge instructed the members that they could not consider the statements for the truth that the victim had in fact made allegations. No objection was taken to his limiting instructions.

Accordingly, we find no error which materially prejudiced the substantial rights of appellant.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Judge (concurring in the result):

Mil.R.Evid. 504(c) (2), Manual for Courts–Martial, United States, 1984, states:

> (2) *Spousal incapacity and confidential communications.* There is no privilege under subdivisions (a) or (b):
>
> (A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse. . . .

HS is appellant's niece. She lived with appellant from age 2 to 12 because Janet Evans was unable to care for her. I would hold that HS was a "de facto" child of appellant and his wife for purposes of this rule.

On the hearsay question noted by Senior Judge Everett and not granted for review by the Court, I find no error. The prosecution wanted to evidence the words of Mrs. McCarty to show her knowledge of or state of mind as to HS's complaint against her husband. Since no complaint had been made by HS at the time Mrs. McCarty said these words, the prosecution hoped the members would infer that her knowledge or state of mind was caused by her husband's telling her incorrectly that such a complaint was made or that such a complaint would be made. Such action by appellant was relevant as evidence of his consciousness of his guilt. The initial evidentiary proposition that Mrs. McCarty said certain words can be proved by testimony of someone hearing those words without violating the hearsay rule if such evidence is not offered to establish the truth of those words. *Cf.* Mil.R.Evid. 801(c) ("Hearsay is a statement . . . offered in evidence to prove the truth of the matter asserted.").

EVERETT, Senior Judge (dissenting):

I agree with the majority's conclusion that the evidence in question was not an inadmissible confidential spousal communication. However, I cannot accept its premise that "[t]here is nothing inherent in the testimony of Janet Evans that reveals itself as a confidential marital communication." __MJ at (4). *See* Mil.R.Evid. 504(b), Manual for Courts–Martial, United States (1995 ed.).

I

When trial counsel offered the testimony of Ms. Evans, defense counsel objected to admissibility of the challenged sentence on the ground, *inter alia*, that it was hearsay––that Mrs. Evans would testify as to what Mrs. McCarty had told her. Mil.R.Evid. 802. In response, trial counsel asserted that it was not hearsay because the prosecution was not offering it to prove the truth of the matter asserted––that is, that appellant had sexually molested his niece. Mil.R.Evid. 801(c). Rather, in the words of the Court of Criminal Appeals, trial counsel contended that this "testimony supplied evidence of the *appellant's guilty mind*, since he must have leaped to the conclusion that Hollie reported his abuse and *told that to his wife*." Unpub. op. at 4 (emphasis added). As an aside, as the majority opinion points out, an argument might well be made under this view that Ms. Evans' testimony might be not only hearsay, but even double or triple hearsay.__MJ at (5) n.2.

Now, in considering the granted issue whether admission of this testimony violated the spousal communication privilege, the majority––in agreement with the Government and with the court below––says no, implicitly, because the testimony does not necessarily represent that Mrs. McCarty learned of the purported allegation *from her husband*. In other words, the testimony itself does not necessarily indicate that appellant's wife had learned of the purported report from her

husband; that she could have learned of it any number of ways; and that, accordingly, appellant had not carried his burden of asserting the privilege.

The circularity of the Government's trial and appellate positions, the latter of which has been subscribed to by the Court of Criminal Appeals and now by the majority of this Court, is obvious: How can one escape the spousal communication issue on the basis that there was no showing that the matter was learned by appellant's wife from her husband, when the only theory relied upon for admission of the testimony over a hearsay objection at trial necessarily was conditioned on appellant having told his wife about the matter?! Either appellant's wife learned of this from her husband (the necessary factual predicate for trial counsel's theory of admissibility), or she did not (the basis of the majority's avoidance of the spousal communication theory).

Nonetheless, I join the majority in rejecting the appellant's claim of spousal privilege. Mil.R.Evid. 504(c)(2)(A) provides that there is no spousal communication privilege "[i]n proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either . . ." While H was not the offspring of appellant and his wife, the fact is that, as her uncle and aunt, they had raised her as their custodial child for over 10 years, since she was 2 years old. I have no doubt that the purpose behind refusing the privilege to one accused of a crime against the couple's child would apply with equal force where the child was in the custody of the couple and for many years had been raised as their own.

II

In my view, however, appellant's hearsay claim must be upheld. The relevance of Ms. Evans' testimony was to establish that Mrs. McCarty had made a statement to her from

which it could be inferred that appellant had stated to his wife that he had abused the child. His statement to Mrs. McCarty would not be hearsay under Mil.R.Evid. 801(d). Arguably, his wife's declaration about the admission appellant made to her was not hearsay, either. *See* Mil.R.Evid. 801(d)(2). However, Ms. Evans' repetition of Mrs. McCarthy's declaration clearly was hearsay and no exception applies to justify reception of this hearsay into evidence. Therefore, it should have been excluded as appellant contended at trial. In my view, reception of the evidence was prejudicial error. Art. 59(a), Uniform Code of Military Justice, 10 USC § 859(a).

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant JOHNNY R. McCARTY,
FR466–88–6695

United States Air Force

ACM 30556

5 April 1995

Sentence adjudged 1 February 1993 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Howard R. Altschwager.

Approved sentence: Bad–conduct discharge, confinement for 10 years, and reduction to E–3.

Appellate Counsel for Appellant: Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, and Captain Robert E. Watson.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise.

Before

HEIMBURG, SCHREIER, and BECKER
Appellate Military Judges

OPINION OF THE COURT

HEIMBURG, Senior Judge:

In a trial before a general court–martial which included enlisted members, the appellant was convicted of attempted carnal knowledge, sodomy and indecent acts on Hollie, a child under 16 years of age, and wrongfully giving alcoholic beverages to persons under 21. Articles 80, 125, and 134, UCMJ, 10 U.S.C. §§ 880, 925, and 934 (1988). His approved sentence is a bad–conduct discharge, confinement for 10 years, and reduction to E–3. The appellant has asserted four errors, none of which we find persuasive.

In his first assignment of error, the appellant asserts the military judge erred in denying his challenge of two members for cause. We consider the challenge against Chief D first. Before the convening authority amended the membership to include Chief D, trial defense counsel had sent him a letter asking for a character reference, which the chief declined to give. At trial, Chief D stated he declined to give a reference because he didn't believe it was "appropriate." The appellant asserts that the chief's refusal to give a character reference amounted to a negative opinion about the appellant. In this appeal, but not at trial, the appellant also seizes on Chief D's response to a voir dire question: had he formed an opinion as to whether the appellant is a truthful or an untruthful person? Chief D replied: "Not that it would pertain to this matter, no, Sir." No one further questioned the chief about this response, and it formed no basis for challenge. The appellant now argues that the chief's reluctance to give a character statement, in light

of this comment, clearly shows that he had formed an opinion that the appellant was not truthful, which he refused to disclose.

The military judge questioned Chief D about the basis for his refusal to give a character statement. The chief responded that he didn't know the appellant very well, not well enough to write a character statement. He denied that his refusal had anything to do with the allegations in the case. The military judge was convinced, as are we, that Chief D's refusal was based on his lack of knowledge of the appellant and his principled policy not to give character statements unless he had a substantial basis for such an opinion.

Trial defense counsel challenged Major J on the basis that he would be improperly influenced by prior knowledge of the case. After counsel finished questioning Major J in individual voir dire about an unrelated matter, the major volunteered that, as he was listening to "input" (presumably from counsel and the judge) he recalled having seen some "paperwork associated with this case as it came through the blotter––the blotter and police reports." Major J said he served as executive officer to the commander who convened the court–martial, and as part of his duties he reviewed all police blotters and reports which came into the office. He recalled no specifics about the appellant's case except the charges, never discussed the case with anyone else, including the commander, and felt himself able to base his decision solely on what he saw and heard in court.

Military judges are enjoined to use a liberal standard when ruling on challenges, but our review is for abuse of discretion. *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993); *United States v. White*, 36 M.J. 284 (C.M.A. 1993). We find that the military judge did not abuse his discretion in denying the challenges against these two members. *United States v. Lake*, 36 M.J. 317, 324 (C.M.A. 1993); *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987).

In his second assignment of error, the appellant asserts the military judge erred in admitting, over defense objection, Hollie's testimony about the appellant's prior sodomy and indecent acts on her. Hollie, who was 14 years old at trial, testified that her earliest memories of the appellant, beginning at age two, were of "him coming into my room and pulling down his pants and telling me to suck his penis." She testified that he also kissed her, touched her, and would "perform oral sex" on her, and these events occurred "three, two times a week" prior to the earliest charged offenses. The military judge ruled this testimony was admissible, under Mil. R. Evid. 404(b), to "prove plan, scheme, or a continuous pattern of conduct" and "to show that the accused had the necessary intent to arouse or appeal to his sexual desires for young girls."

Our review of the military judge's ruling is for abuse of discretion. *United States v. Acton*, 38 M.J. 330, 332 (C.M.A. 1993), *cert. denied*, — U.S. — , 114 S. Ct. 1056 (1994). When we consider the admissibility of evidence under Mil. R. Evid. 404(b), we bear in mind that it need not "fit within a particular category listed in the rule." *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989). The military judge spoke of "plan, scheme, or a continuous pattern of conduct," but if the evidence he admitted is relevant for some purpose other than to demonstrate criminal predisposition, and if its probative value is not substantially outweighed by the danger of unfair prejudice, it is admissible. *Acton*, 38 M.J. at 333; *Castillo*, 29 M.J. at 150; Mil. R. Evid. 403.

Hollie could not, with few exceptions, recall specific times and occasions when the appellant committed the various sexual acts on her, in large part because the acts began so early in her life and continued for so long. The evidence of appellant's prior acts was properly admitted to explain her

lack of specificity. Moreover, such evidence was admissible to show why Hollie was so conditioned by the appellant's behavior that she didn't complain or turn him in to authorities when she became older. *See Acton; United States v. Saul*, 26 M.J. 568 (C.M.A. 1988). We find no abuse of discretion in the military judge's ruling admitting Hollie's testimony about the appellant's prior acts of sexual abuse. Mil. R. Evid. 403.

The appellant's third assignment of error is that the military judge erred in permitting a breach of the marital privilege of Mil. R. Evid. 504(b). Over defense objection, the military judge permitted Janet, Hollie's mother, to testify about a telephone conversation she had with appellant's wife the morning before Hollie reported the appellant's sexual abuse.

Hollie was called into the base security police office on a Friday evening, accompanied by the appellant, to be questioned about the theft of some rings. Hollie testified that the appellant was nervous, and, as he drove her to the security police office he cautioned her not to report their sexual acts. She testified that she did not report sexual abuse by the appellant, despite being questioned about it by investigators who were suspicious of her relationship with the appellant. The investigators corroborated Hollie's testimony that no report was made that evening. Nevertheless, because of their suspicions about the family, they called a state social worker, who put Hollie into a temporary "receiving home." The next morning, Janet testified, the appellant's wife telephoned her, ostensibly to cancel a previously–planned birthday celebration for Hollie. Janet testified that the appellant's wife said that Hollie "had accused [appellant] of sexually molesting her, and that if I would please, please, just tell her and convince her not to press charges, that I could have my daughter back." Trial counsel argued that Janet's testimony supplied evidence of the appellant's guilty mind, since he must have leaped to

the conclusion that Hollie reported his abuse and told that to his wife.

Although the appellant argues that the testimony of Janet constituted a breach of the spousal communication privilege, we find no breach because we find no testimony relating a spousal communication. Janet's testimony reported a conversation she had with the appellant's wife, initiated by the appellant's wife. None of Janet's testimony about that conversation revealed any purported words spoken between the appellant and his wife. Nor did Janet testify about the *substance* of anything that appellant *told* his wife. The appellant's wife reported, as a fact, that Hollie reported sexual abuse. The trial counsel, by proving that no report occurred, used Janet's testimony as circumstantial evidence to show that the appellant must have told his wife something she could have learned nowhere else: that Hollie reported his alleged sexual abuse to authorities. From that, he argued the appellant's consciousness of guilt. While the appellant is certainly correct that trial counsel treated the appellant's wife's comments, as reported by Janet, as circumstantial evidence to show the appellant's guilty state of mind, we find no spousal "confidential communication" here to protect. Mil. R. Evid. 504(b)(1).

In his final assignment of error, the appellant asserts the military judge erred in his instruction on the elements of the specification of Charge IV, which charged the appellant with wrongfully giving alcoholic beverages to minors in violation of state law, the Assimilated Crimes Act, and Article 134, UCMJ. The judge instructed the members on an additional element not required for conviction of an assimilated crime under 18 U.S.C. § 18 (1988), but that did not prejudice the appellant. *United States v. Williams*, 17 M.J. 207, 216–17 (C.M.A. 1984). While the instructions on this offense were not a model of clarity (the judge misspoke at one point), no

element was omitted, and, considered as a whole, they adequately informed the members of all the elements they were required to find beyond reasonable doubt. The appellant did not object. We find no prejudice to the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988). *See United States v. Alford*, 31 M.J. 814, 817–19 (A.F.C.M.R. 1990).

We conclude the findings and the sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Judges SCHREIER and BECKER concur.

OFFICIAL

ALVIN STRIBLING
Technical Sergeant, USAF
Chief Court Administrator